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March 8, 2023

Re: *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, Case No. 1:13-cv-07789-LGS

Dear Judge Schofield:

Credit Suisse respectfully submits this letter in response to Plaintiffs' March 2, 2023 pre-motion letter (ECF No. 2039). Plaintiffs ask the Court to certify its October 24, 2022 Order for Judgment (ECF No. 2017) as an appealable final judgment under Federal Rule of Civil Procedure 54(b). Credit Suisse does not object to Rule 54(b) certification to permit an appeal of the claims at issue in the October 24, 2022 Order, but Credit Suisse respectfully submits that the Court should instead enter final judgment as to all claims and bring this decade-old litigation to a close.[1]

No viable "pending claims" remain. In addition to the Sherman Act Section 1 claims of the OTC Class (*i.e.*, the claims on which Credit Suisse prevailed at trial), the operative Complaint sets out claims under the Sherman Act and Commodity Exchange Act on behalf of the so-called "Exchange Plaintiffs."[2] These individual "Exchange Plaintiffs" (no class has been certified) are represented by the same counsel as the OTC Class, yet none of them have pursued their claims for years.

As to Exchange Plaintiffs' Sherman Act claims, Plaintiffs sought class certification in 2018, and the Court denied certification.[3] Plaintiffs did not seek an interlocutory appeal under Fed. R. Civ. P. 23(f) and have not otherwise pursued those claims since.[4] Exchange Plaintiffs have

[1] Alternatively, the Court could order Exchange Plaintiffs to show cause why their individual claims should not now be dismissed.
[2] *See* Third Amended Complaint, ECF No. 619, at ¶¶30, 32-45.
[3] ECF No. 1331 at 22.
[4] Exchange Plaintiffs could not voluntarily dismiss the claims without waiving the right to appeal the Court's decision denying certification of the proposed Exchange Class. *Microsoft Corp.* v. *Baker*, 582

allowed their Commodity Exchange Act claims to sit dormant for even longer. Plaintiffs never even sought class certification as to these claims.

Fed. R. Civ. P. 41(b) permits dismissal for failure to prosecute where, as here, a plaintiff does not pursue claims for an extended time. *See, e.g.*, *Link* v. *Wabash Railroad Company*, 370 U.S. 626, 629 (1962) ("The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted."); *Shannon* v. *General Electric Co.*, 186 F.3d 186, 194–95 (2d Cir. 1999).

In the many years since Exchange Plaintiffs last pursued their individual claims, fact and expert discovery ended, and the case proceeded to trial. Throughout, Exchange Plaintiffs had ample opportunity to pursue their individual claims but elected not to do so. Even as the trial addressed and resolved the same underlying questions of collusion and manipulation that Exchange Plaintiffs had alleged, they did not prosecute their individual claims.[5] Basic principles of efficiency and fairness dictate that Plaintiffs cannot get a second bite at litigating those issues in this proceeding. Nor would it make sense for separate appeals to proceed as to any issues specific to Exchange Plaintiffs' claims, or the Court's denial of class certification as to those claims.

The Court should dismiss the remaining claims at this stage and enter final judgment in Credit Suisse's favor, permitting Plaintiffs to pursue whatever avenues of appeal they wish.

Respectfully submitted,

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U.S. 23, 41 (2017) (court of appeals lacked jurisdiction under 28 U.S.C. §1291 to review an order denying class certification where named plaintiff voluntarily dismissed claims).

[5] Plaintiffs' Complaint makes clear that the same alleged "manipulation of the spot market currency prices" addressed at trial is the factual predicate of Exchange Plaintiffs' claims. (ECF No. 619 at ¶¶415-16.)

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